Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

78-366

SIDNEY FRIED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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SIDNEY FRIED,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Sidney Fried prays that a writ of certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on May 12, 1978.

Citations to Opinions Below.

The judgment of the Court of Appeals is reported at .... F.2d ..... Said opinion is printed and attached hereto and made a part hereof as Appendix "A". The denial of petitioner's petition for rehearing and suggestion for rehearing *en banc* is printed and attached hereto and made a part hereof as Appendix "B".

Jurisdiction.

The Ninth Circuit Court of Appeals affirmed the conviction of petitioner on May 12, 1978. On July 17, 1978, the Ninth Circuit Court of Appeals denied petitioner's petition for rehearing and suggestion for hearing *en banc*. On August 9, 1978, petitioner sought and obtained from the Clerk of this Court an extension of time to September 1, 1978 within which to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

All questions raised in this Petition were raised in the court below and on appeal to the Ninth Circuit Court of Appeals.

Question Presented.

Whether petitioner's constitutional rights to due process and a full and fair hearing by an impartial grand jury were violated by the trial court's refusal to quash a grand jury indictment returned against the petitioner without any incriminating evidence having been presented to the grand jury.

Constitutional Provision.

The Constitutional provision involved is the Fifth Amendment to the United States Constitution. 1 U.S.C. XLVI.

Statement of the Case.

Petitioner was originally charged with three other individuals in a one-count indictment alleging a violation of 18 U.S.C. §2314—the interstate transportation of stolen property of a value in excess of $5,000

[C.T. 1].[1] Prior to trial, petitioner made a motion to dismiss the indictment on the ground that the grand jury which returned the indictment heard no evidence whatsoever with respect to any activity of petitioner from which it might reasonably conclude that there was probable cause to suspect petitioner of the crime charged [C.T. 11]. The motion was denied by Judge Schnacke on April 19, 1977.

After a severance of two defendants, the jury trial of petitioner and a co-defendant began on April 25, 1977. The government concluded its presentation of evidence on April 26, 1977, at which time petitioner moved for a judgment of acquittal pursuant to Federal Rules of Criminal Procedure 29 and was denied his motion [R.T. 194-197].[2] Petitioner presented no evidence [R.T. 203]. The jury returned verdicts of guilty as to both defendants [C.T. 66].

Petitioner noticed his appeal from the judgment of the trial court on September 27, 1977 [C.T. 68]. The appeal was denied on May 12, 1978. Thereafter, petitioner's motion for reconsideration and suggestion for hearing *en banc* was denied on July 17, 1978.

Statement of Facts.

On January 26, 1977, Assistant U.S. Attorney Ray Bietz presented the Government's evidence to the grand jury and requested that the grand jury return this indictment against petitioner and his co-defendant. The sole witness appearing before the grand jury was C. David Robinson, the FBI agent who investigated this case. The FBI agent did not testify as a witness to

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[1]Reference "C.T." is to the Clerk's Transcript.

[2]Reference "R.T." is to the Reporter's Transcript.

any of the transactions alleged in the indictment. Rather, he narrated the government's version of the underlying facts.[3] Throughout the entire course of Robinson's testimony, petitioner's name was mentioned a total of three times. The first time he is mentioned occurs at page 5 of the grand jury transcript, in which Robinson testifies that:

> "Guglielmini, and an individual by the name of Sidney Fried came into San Francisco, and the meeting was set up between Dorward, DiRodio and myself in an undercover capacity as a lawyer for 1:00 that day."

The second mention of petitioner's name occurs at page 6 of the transcript, where Robinson testifies that:

> "We arrested Robert Herko and Sidney Fried in their hotel room at the Holiday Inn."

The third and final mention of petitioner also occurs at page 6 wherein Robinson states that:

> "Sidney Fried advised us that he just accompanied Herko because he was asked to. He did state, while in the room of the Holiday Inn on the 10th, two individuals, one, George and Art did come into the room and conducted some business with Herko."

No other mention is made anywhere in the grand jury transcript of any evidence which in any way relates to the petitioner. Following the Assistant U.S. Attorney's presentation, the grand jury returned an indictment charging the petitioner and his co-defendants with the interstate transportation of solen property.

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[3]The transcript of the grand jury proceedings was ordered by the Court to be made available to petitioner [C.T. 5], a copy of which is printed and attached hereto as Appendix "C".

The petitioner went to trial on the indictment and, at the conclusion of the prosecution's case, petitioner moved for a judgment of acquittal under Federal Rules of Criminal Procedure 29, which motion was denied [R.T. 194].

On appeal to the Ninth Circuit Court of Appeals, petitioner raised four grounds for reversal of his conviction based upon the paucity of evidence introduced against him at various stages of this proceeding. Petitioner seeks this writ of certiorari to review only the proceedings before the grand jury, on the ground that no incriminating evidence whatsoever was introduced against petitioner and that the grand jury indictment should have been dismissed as against the petitioner.

REASONS FOR GRANTING THE WRIT.

The instant case presents squarely for decision a criminal defendant's right to challenge a grand jury indictment which has been returned without the introduction of any incriminating evidence whatsoever against the petitioner. Although this Court has determined that an indictment may not be challenged on the ground of inadequate or incompetent evidence, the Court has also recognized a basic distinction between inadequate evidence and a total lack of evidence based upon the due process clauses of the Fifth and Fourteenth Amendments. Since a grand jury indictment is subject to dismissal for violation of a defendant's constitutional rights, it is respectfully submitted that an indictment returned without any incriminating evidence against the defendant violates his rights to due process and to a full and fair hearing before an impartial grand jury and is therefore subject to dismissal.

1. An Indictment is Subject to Dismissal for Violation of a Criminal Suspect's Constitutional Rights.

It has never been seriously questioned that a criminal defendant may challenge an indictment returned against him by a grand jury upon the ground that the indictment was improperly obtained. *Brady v. United States,* 24 F.2d 399, 405, 407 (8th Cir. 1928); *Jones v. United States,* 342 F.2d 863 (D.C. Cir. 1964); *United States v. Tane,* 329 F.2d 848 (2nd Cir. 1964); *United States v. Fox,* 425 F.2d 996 (9th Cir. 1970). This Court has implicitly recognized a criminal defendant's right to challenge a grand jury indictment in its landmark holdings limiting the scope of review of an indictment. *Costello v. United States,* 350 U.S. 359 (1956); *Lawn v. United States,* 355 U.S. 339 (1958).

In *Cassell v. Texas,* 339 U.S. 282 (1950), this Court held that the lower courts committed reversible error by refusing to quash an indictment returned by a grand jury which unconstitutionally excluded blacks. Since that time, the circuit courts have developed a substantial body of law in support of a rule requiring that an indictment be quashed where it is obtained in violation of federal constitutional rights and substantial prejudice results. For example, in *Jones v. United States,* 342 F.2d 863 (D.C. Cir. 1964), the court held that the trial court below committed reversible error by failing to dismiss an indictment where the defendant was denied his right to counsel prior to and during his testimony before the grand jury, in violation of the McNabb-Mallory Rule. In *United States v. Tane,* 329 F.2d 848 (2nd Cir. 1964), the dismissal of an indictment was affirmed on the ground that it derived from evidence obtained through illegal wire tapping.

The leading judicial authority upon the rights of an indicted defendant to challenge an indictment returned against him because of defects in the grand jury process has been the opinion of this Court in *Costello v. United States,* 350 U.S. 359 (1956). There, the Court established the often-stated rule that a defendant is not entitled to the dismissal of an indictment on the ground of inadequate or incompetent evidence. An examination of the developing case law after *Costello* discloses that there is confusion among the lower courts as to whether a defendant may successfully challenge an indictment returned in violation of the defendant's constitutional rights. As a result, there is an irreconcilable conflict among the lower courts.

The district courts and circuit courts have interpreted the *Costello* rule to mean that, although a defendant

may move to quash an indictment upon the ground that it is based upon inadequate or incompetent evidence, such motion is subject to the discretion of the trial court, and may only be reviewed where the trial court is shown to have abused its discretion. For example, in *United States v. DiGrazia,* 213 F.Supp. 232 (N.D. Ill. 1963), the trial court dismissed an indictment as to two defendants upon the ground that the prosecutor failed to advise one defendant of his *Miranda* rights and asked prejudicial and irrelevant questions of the second defendant, which may have biased the grand jury's return of the indictment. Even though in that case the trial court did not have before it the transcript of the grand jury proceedings, the court found that any doubt that the improper conduct of the prosecutor resulted in bias on the part of the grand jury should be resolved in favor of the defendants.

Similarly, in *United States v. Whitted,* 325 F.Supp. 520 (D. Neb. 1971), the trial court quashed an indictment on the ground that a prosecutor had improperly biased the grand jury by asking irrelevant and prejudicial questions of the defendant. In that case, the court found support for its actions in language used by this Court requiring that a defendant be guaranteed his federal Constitutional right "to a fair and impartial grand jury." (325 F.Supp. at 522, citing *Cassell v. Texas,* 339 U.S. 282 (1950) and *Lawn v. United States,* 355 U.S. 339 (1958).) In *United States v. Kreps,* 349 F.Supp. 1049 (W.D. Wisc. 1972), the court dismissed an indictment as to a defendant who testified before the grand jury without receiving his *Miranda* warnings, which testimony resulted in an indictment against him. As in *DiGrazia, supra,* the court found that, although it was impossible to know precisely

whether the defendant's own testimony had been a significant factor in the grand jury's determination to return an indictment, the mere possibility that the grand jury's deliberations could have been affected by the illegal use of defendant's testimony was a sufficient ground upon which to dismiss the indictment.

While there is apparent agreement that a motion to dismiss or quash an indictment is subject to the discretion of the trial court, the circuit court opinions following the *Costello* decision have not been in harmony regarding the standard of review to be applied to the trial court's exercise of its discretion. Thus, in *United States v. Fox,* 425 F.2d 996 (9th Cir. 1970), the Ninth Circuit acknowledged that the trial court had the discretion to quash an indictment against defendant, but held that discretion was not abused where competent evidence, in addition to prejudicial evidence, was presented to the grand jury in support of the indictment. On the other hand, the District of Columbia Circuit appears to have used a different standard to review the exercise of a trial court's discretion in denying a motion to quash an indictment. In *Jones v. United States,* 342 F.2d 863 (D.C. Cir. 1964), the District of Columbia Circuit held that an indictment obtained through the testimony of a defendant in violation of his right to receive assistance of counsel *must* be dismissed. The court there reconciled its holding with that of this Court in *Costello* and *Lawn* by reasoning that those cases applied only when grand jury proceedings had not violated Constitutional rights. In support of that position, the court gave its interpretation of the *Costello* rule:

> "Due deference forbids us to interpret the opinion as containing a vast dictum to the effect that

the entire Constitution, including all its amendments, 'requires nothing more'; in other words, that the proceedings of a legally constituted and unbiased grand jury may violate any number of defendant's constitutional rights, including his right to the assistance of counsel and his privilege against the validity of the indictment. *Costello,* therefore, is no bar to our view that an indictment obtained in violation of constitutional rights must be dismissed. On the contrary, *Costello* substantially supports this view. For the Supreme Court affirmed the conviction of *Costello* on the grounds that the grand jury's action in indicting him had not violated his constitutional rights. The court thereby implied that if the grand jury's action had violated his constitutional rights, the indictment would have been invalid and the conviction would have been reversed." (342 F.2d at 872).

The explanation of the *Costello* rule given by the court in *Jones v. United States, supra,* is not without support. Indeed, one of the concurring justices in the *Costello* decision, Mr. Justice Burton, set forth a similar analysis of the scope of the rule announced by the court in *Costello*. He stated there that:

"I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that

indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." (350 U.S. at 364).

Summarizing the foregoing discussion of judicial authority following this Court's opinion in *Costello, supra,* the lower courts have tended to support a rule which allows a criminal defendant to successfully challenge an indictment which is returned in violation of the defendant's constitutional rights. Although this Court has not expressly sanctioned the rule, *Costello* itself inherently appears to support such a principle, as elucidated by Mr. Justice Burton in his concurring opinion in that case.

In spite of the clear line of authority in support of a defendant's right to challenge an indictment on the ground that it was obtained in violation of his constitutional rights, the language of *Costello* has nonetheless caused confusion among some of the lower courts, resulting in irreconcilable holdings among them. The instant case presents an explicit example of one trial court's view of the *Costello* rule to totally preclude any challenge by a defendant of the indictment by which he is charged. The opinion of the Ninth Circuit Court of Appeals herein reports that, in ruling upon petitioner's motion to quash the indictment:

"The district judge concluded that he was foreclosed by *Costello v. United States,* 350 U.S. 359 (1956), from inquiry into the sufficiency of the evidence upon which the indictment was based. . . ." (Appendix A at p. 9).

While the district judge has properly stated the rule of *Costello,* petitioner maintains that *Costello* was erroneously applied since petitioner's challenge of the indictment raised the issue that petitioner had been denied his rights to due process and a fair hearing before an unbiased grand jury. Petitioner respectfully submits that the courts below have erred in their interpretation and application of the *Costello* rule, and that a writ of certiorari should issue to examine and clarify the inherent principle acknowledged by the court in *Costello* that an indictment is properly subject to dismissal where it has been obtained in violation of a criminal defendant's constitutional rights.

2. Petitioner's Rights to Due Process and a Fair Hearing by an Impartial Grand Jury Guaranteed Under the Fifth Amendment to the Constitution Were Violated by the Return of Indictment Without the Presentation to the Grand Jury of Any Incriminating Evidence Whatsoever Against Petitioner.

(a) A Constitutional Distinction Exists Between "Inadequate Evidence" and a Total Lack of Evidence.

Although it has long been settled that appellate courts may not review the sufficiency of evidence presented against a defendant in a criminal case, the Supreme Court in the landmark decision of *Thompson v. City of Louisville,* 362 U.S. 199 (1960) recognized that a basic distinction exists between "inadequate evidence and the absence of evidence" to support a criminal conviction. The court stated the constitutional rule that:

> "Just as 'conviction upon a charge not made would be sheer denial of due process,' so is it a violation

> of due process to convict and punish a man without evidence of his guilt." (362 U.S. at 206).

This Court further elucidated the principle first announced in the *Thompson* case five years later in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 94 (1965). In *Shuttlesworth,* the defendant was convicted of violating traffic ordinances. The Court found that the evidence in the record did not show that petitioner had committed either of the violations charged. Further, the court explained its ruling by denying that it had conducted a review of the sufficiency of the evidence supporting the conviction, but rather had applied the constitutional principle announced in *Thompson* and derived from the due process clause of the Fourteenth Amendment. The court stated its reasoning as follows:

> "Five years ago this Court decided the case of *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. There we reversed the conviction of a man who had been found guilty in the police court of Louisville, Kentucky of loitering and disorderly conduct. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out 'not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.' 362 U.S. at 199, 80 S.Ct. at 625. The Court found there was 'no evidence whatever in the record to support these convictions,' and held that it was a 'violation of due

process to convict and punish a man without evidence of his guilt.' 362 U.S. at 206, 80 S.Ct. at 629. See also, *Garner v. State of Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207." (382 U.S. at 94, 95).

In the intervening years since *Thompson* and *Shuttlesworth* were decided, this Court has, on at least two occasions, repeated the principle first announced there. In *International Bro. of B., I.S., B., F.&H. v. Hardeman,* 401 U.S. 233, 246, 247 (1971), the Court held that the Constitutional requirement of due process required at least *some* incriminating evidence against an individual charged in a union disciplinary proceeding. By this holding, the Court indicated that the standards of due process are not only applied to review criminal convictions, but rather should be applied in any hearing process subject to constitutional limitations. *See also, Vachon v. New Hampshire,* 414 U.S. 478, 481 (1974) in which a defendant's conviction was reversed where this court's examination of the trial record disclosed a complete lack of evidence to support the finding that defendant had personally sold objectionable material to a minor.

(b) The Due Process Requirement That Some Evidence Be Produced Against a Defendant Should Also Be Applicable in a Grand Jury Proceeding to Support the Return of an Indictment.

It is the responsibility of a grand jury convened for the purpose of determining whether to return an indictment against a criminal suspect to ascertain whether or not the prosecutor has established sufficient evidence to support a finding of probable cause that the suspect may have committed the crime charged.

As was stated by the Fifth Circuit Court of Appeals in *United States v. Cox,* 342 U.S. 167, 171 (5th Cir. 1965):

> "The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed."

The essence of the concept of probable cause is that the court be presented with at least some evidence which would support a suspicion that a suspect has committed the crime charged. While the term "probable cause" implies a lesser standard of proof than that required to convict a defendant of a crime, a finding of probable cause must at least be supported by some evidence.

Although the standard of probable cause required to indict a criminal suspect has not been considered in the context of a grand jury proceeding, nevertheless, this Court has often dealt with the concept of probable cause when reviewing the sufficiency of evidence supporting the issuance of arrest and search warrants. For example, in *Aguilar v. State of Texas,* 378 U.S. 108, 114 (1964), the Court held that, to support the issuance of a search warrant based upon probable cause, a magistrate must make an independent determination that there is sufficient evidence of the underlying circumstances from which an informant concludes that the defendant may have committed the crime charged. In *Spinelli v. United States,* 393 U.S. 410, 412, 413 (1969), this Court further explained the requirements of *Aguilar* to mean that a search warrant must be supported by evidence which independently establishes the credibility of a hearsay informant and, in addition,

supports the information given by the informant. Inherent in both of these rulings is the concept that the standard of "probable cause" requires at least a minimum presentation of evidence tending to incriminate the accused. Indeed, this Court has not hesitated to hold that a search warrant is invalid where the minimum standard announced in *Aguilar* and *Spinelli* is not met.

The same standard of "probable cause" applied in the context of search warrants has also been repeatedly applied by this Court and the lower courts to define the standard under which an indicting grand jury must act. If that standard has any meaning at all, it must, at the very least, require that a grand jury be presented with some evidence against an accused before an indictment is properly returned.

Indeed, although this question has never been squarely presented to this Court, it has not gone unnoticed by several distinguished judicial authorities. For example, the opinion of Circuit Judge Learned Hand, writing for the majority in *Costello v. United States,* 221 F.2d 668, 677 (1955), *aff'd,* 350 U.S. 359 (1956), accepts this proposition as an undisputed minimum requirement for the proper return of an indictment. There, Hand states that:

> "We should be the first to agree that, if it appears that no evidence had been offered that rationally established the facts, the indictment ought to be quashed, because then the grand jury would have in substance abdicated."

As Judge Hand indicates in his opinion, prior circuit court opinions had approved this principle, and quashed indictments returned where no competent evidence was

presented to the grand jury. For example, in *Brady v. United States,* 24 F.2d 405 (8th Cir. 1928), while the court acknowledged the rule that an indictment may not be quashed on the grounds of insufficiency of evidence, nevertheless it noted that a different standard should apply where no evidence was presented against a defendant to support an indictment against him holding:

> "It is the settled law of this circuit, we think, that an indictment will be quashed, where there was either no evidence whatever, or no competent evidence of the offense charged, presented to the grand jury. *Nanfito v. U.S.* (C.C.A. 8), 20 F.(2d) 376, 378; *Murdick v. U.S.* (C.C.A. 8, 15 F.2d 965, 967; *Anderson v. U.S.* (C.C.A. 8), 273 F.20, 29; *McKinney v. U.S.* (C.C.A. 8), 199 F.25, 33. We think the same rule should be applied where a grand jury returns an indictment without any evidence whatever before it of a separate, distinct, and essential element of the offense, such as the use of the mails under §215, and the overt act or acts under §37. [Citations omitted.] (24 F.2d at 407, 408.)"

As noted earlier, Mr. Justice Burton, in his concurring opinion in *Costello v. U.S., supra,* acknowledges that the *Costello* rule does not completely insulate a grand jury indictment where it can be shown that the indictment is supported by no evidence against the accused. Nevertheless, as is illustrated by the opinion of the court below in the instant case, the principle which, at one time, appeared to be undisputed, has apparently been clouded in the eyes of the lower courts by the language of this Court's opinion in *Costello,*

which appears to preclude all review of the evidence presented to an indicting grand jury. It is respectfully submitted that, in order to retain some of the protection guaranteed an accused under the Fifth Amendment, an indictment must, at the very least, be subject to review upon the ground that no incriminating evidence was presented to the grand jury to support the finding of probable cause necessary to return an indictment.

Petitioner therefore requests that this Court issue a writ of certiorari to clarify the *Costello* rule by approving of the heretofore accepted principle which requires that an indictment be dismissed where it is obtained without presentation to the grand jury of any incriminating evidence against the defendant.

The proposition advanced by petitioner finds support in the current criticism of the grand jury system. Indeed, the United States Congress has been much concerned with the operations of the grand jury and, as a consequence, has conducted extensive hearings on the reform of the grand jury system before the Committee on the Judiciary. (*See* Report of the Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 94th Congress, 2d Session, on Reform of the Grand Jury System, September 28, 1976.) Witnesses before the Senate in hearings on the reform of the grand jury system presented significant and substantial criticisms of the process in which indictments are sought by criminal prosecutors. For example, the Honorable John K. Van de Kamp, the District Attorney of Los Angeles, California, presented the following general criticisms of grand jury practice:

> "Under the present system, the federal agent assigned to the case (the 'case agent') will typically present the evidence against the accused in a narrative and summary fashion thus eliminating the need for the government to bring any 'live witnesses' before the grand jury. In this way, the grand jury is deprived of an opportunity to see and hear percipient witnesses, or to evaluate their credibility and demeanor. Instead, the grand jury will vote to return an indictment based on the strength of the agent's summary presentation, an agent who usually has concluded that the accused is responsible and is quite naturally (and sometimes competitively) predisposed toward the obtaining of an indictment."

Similar sentiments were expressed repeatedly by witnesses and commentators whose views were presented to the Senate. For example, the Honorable Stanley Mosk, Associate Justice, California Supreme Court, commented extensively upon the disparities of rights between defendants charged by preliminary hearing as opposed to those charged by grand jury indictment. Of particular importance in this case is his view that the equal protection guaranteed under the Constitution requires that all criminal defendants have the same opportunity to challenge the finding of probable cause returned by either a magistrate at a preliminary hearing or the grand jury through indictment proceedings. He states his view as follows:

> ". . . I am of the view that equal protection requires that all criminal defendants have the same opportunity to prove to a magistrate that there is no probable cause to bind them over for trial. 'The purpose of the preliminary hearing is to weed out groundless or unsupported charges of

> grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.' [Citation omitted.] A proceeding of such significance cannot, consistent with the constitutional mandate of equal protection, be selectively denied." (Hearings, at p. 97).

Petitioner does not argue here that the same procedural safeguards as are applied in a preliminary hearing should be applicable in a grand jury hearing convened for the purpose of returning an indictment. Instead, petitioner seeks a reaffirmation of a principle which, although acknowledged in theory, has been denied to him in practice. That is, that the grand jury must perform its function of determining whether or not a prosecutor has presented any evidence sufficient to support a finding of probable cause necessary to the return of an indictment. This does not require that a reviewing court weigh the sufficiency of evidence presented to the grand jury. Rather, it requires a simple determination of whether any incriminating evidence whatsoever is presented to the grand jury. As this Court has acknowledged in the past, there is a fundamental distinction between these two standards of review. While the court may not indulge in an independent review of the sufficiency of evidence, at the very least, the constitutional requirements of due process and a fair hearing before the grand jury require that the reviewing court determine whether any evidence was presented by the prosecutor to support a finding of probable cause necessary for the grand jury's return of an indictment.

The standard of review advanced by petitioner is neither a unique concept, nor an unused one. For example, in California, a defendant prosecuted by indictment has the right to move to set aside the indictment if he has been indicted without reasonable or probable cause. (California Penal Code §995.) He has the same right with respect to prosecution by information. In the event that a California trial court erroneously denies a motion to set aside an indictment or information, the defendant has the right to seek an extraordinary writ in the appellate courts. (California Penal Code §999a.) The erroneous denial of such a motion can be set forth as a ground for appeal from a judgment of conviction. (*People v. Triggs,* 8 Cal.3d 884, 888, 506 P.2d 232 (1973).)

Petitioner respectfully submits that, in order to minimally safeguard a defendant's right, under the Fifth Amendment of a full and fair inquiry before an impartial grand jury, and the right of petitioner to due process of law guaranteed by the Fifth Amendment, the return of an indictment by a grand jury must meet the minimal standard of probable cause by a showing of at least some evidence tending to show petitioner's participation in the crime charged against him in the indictment. As illustrated above, this proposition is supported by numerous judicial authorities, both prior and subsequent to this Court's holding in *Costello v. United States, supra.* Moreover, there is growing public support for the recognition of at least minimal safeguards to a defendant charged by indictment of a federal crime.

The proposition advanced here does not dispute this Court's holding in *Costello,* but merely seeks clarification of the rule to apply it only where an indictment

has not been returned in violation of an accused's Constitutional rights. Indeed, to apply *Costello,* as the court below did in petitioner's case, to totally preclude review of an indictment on grounds of *Constitutional* violations would sanction a total abdication of the grand jury's duty to review evidence and determine whether there is probable cause to indict. Accordingly, petitioner respectfully requests that this Petition for Writ of Certiorari be granted to review the scope of the *Costello* rule where it appears that an indictment has been returned in violation of an accused's constitutional rights.

3. The Court Below Committed Reversible Error by Refusing to Quash the Indictment.

As set forth in the Statement of Facts above, the prosecution obtained an indictment against petitioner upon the presentation of a single witness testifying to the series of events alleged to constitute a federal crime. Throughout the testimony of this witness, petitioner's name was mentioned a total of three times. The sum total of the evidence thus presented to the grand jury, at the very most, established that (1) petitioner accompanied one of his co-defendants to San Francisco; (2) petitioner was arrested in a hotel room along with co-defendant; and (3) petitioner denied any connection with the acts alleged to have been performed by his co-defendants.

It is beyond dispute that the mere presence of an individual in the company of other individuals accused of committing a crime is not incriminating, in and of itself. *Glover v. United States,* 306 F.2d 594 (9th Cir. 1964); *Causey v. United States,* 352 F.2d 203 (5th Cir. 1965); *United States v. Kompkinsky,* 373

F.2d 429 (2nd Cir. 1967); *United States v. Webb,* 359 F.2d 558 (6th Cir. 1966); *United States v. Ford,* 324 F.2d 950 (7th Cir. 1963). To support a finding of probable cause, the grand jury in this case would have had to infer from petitioner's mere presence in the room in which co-defendant Herko was arrested that petitioner knew of the alleged theft of stolen securities and participated in it. There is absolutely no other evidence which would in any way support these inferences. In fact, the only other evidence introduced by the prosecutor at the grand jury hearing was petitioner's denial of knowledge or participation in the offense charged.

Petitioner respectfully submits that, since his mere presence in the company of a co-defendant is not, of itself, evidence tending to incriminate him, and there is a complete lack of any other evidence pertaining to him in any way whatsoever, that the prosecutor failed to present the grand jury with any incriminating evidence to support the grand jury's finding of probable cause to return the indictment against petitioner. Accordingly, there was no basis upon which the grand jury could have returned an indictment charging him with the crime of interstate transportation of stolen securities.

Petitioner maintains that the trial court committed reversible error in denying his motion to quash the indictment on two separate grounds. First, the trial court applied an erroneous standard to review the sufficiency of the indictment; second, the trial court abused its discretion in denying petitioner's motion to quash the indictment where petitioner established that the prosecutor had failed to introduce any incriminating evidence whatsoever to support a finding of

probable cause by the grand jury. The first basis for assignment of error is derived from the foregoing discussion of the *Costello* rule, as modified by the subsequent judicial authority holding that an indictment is subject to dismissal where an accused's Constitutional rights are violated. The trial court erroneously held that the holding in *Costello v. United States, supra,* precluded any review of the evidence presented to the grand jury in support of the indictment. Since the *Costello* rule applies only to Constitutionally valid indictments, it is respectfully submitted that the trial court erred by applying the *Costello* standard of review in this case.

The second reversible error committed by the trial court consists of its abuse of discretion in refusing to quash petitioner's indictment even though petitioner clearly proved a complete lack of incriminating evidence presented against him to the grand jury. While the court may use its discretion to review alleged insufficiencies of evidence as a basis upon which to quash an indictment, petitioner respectfully submits that, where there is a total lack of evidence, the grand jury violates petitioner's rights under the Fifth Amendment, which mandates the trial court to dismiss or quash the indictment.

In conclusion, petitioner respectfully submits that a trial court commits reversible error by failing to review an indictment where a criminal defendant alleges that the indictment has been returned in violation of his Constitutional rights. Further, it is submitted that the return of an indictment by a grand jury without the presentation of any incriminating evidence whatsoever against a petitioner is in violation of the defendant's Constitutional rights to due process and a fair hearing before the grand jury. The courts below did not apply this standard to petitioner's challenge of

the indictment returned against him, and thus committed reversible error. It is therefore requested that the decisions of the courts below be reversed, and that petitioner's conviction be reversed on the ground that the indictment returned against him was improperly returned in violation of petitioner's Constitutional rights.

Conclusion.

Petitioner respectfully submits that a writ of certiorari should issue to examine the Constitutional requirements for the return of indictments by grand juries. Not only has the grand jury been the subject of recent criticism by many respected authorities, including the United States Senate, but the standards to be applied to review a grand jury proceeding have been the subject of confusion and inconsistencies throughout the district and circuit courts. Petitioner respectfully submits that the time is right for a review of the minimal Constitutional standards which must be applied to proceedings by indicting grand juries. As the record in this case demonstrates, the lack of clearly articulated standards to be applied to grand jury proceedings has resulted in injustice and abuse of the grand jury system. For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MANATT, PHELPS, ROTHENBERG & TUNNEY,
JOHN V. TUNNEY,
BRIAN J. O'NEILL,
RONALD J. SILVERMAN,
CATHERINE J. DEBONO,
By JOHN V. TUNNEY,
Attorneys for Sidney Fried, Petitioner.

APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, -vs- Sidney Fried, Defendant-Appellant. No. 77-3403.

Filed May 12, 1978.

Appeal from the United States District Court for the Northern District of California.

Before: Wallace and Anderson, Circuit Judges, and East,* District Judge.

Wallace, Circuit Judge:

Fried appeals his conviction by a jury for violating 18 U.S.C. § 2314 by transporting in interstate commerce stolen property valued in excess of $5,000. We affirm.

I

In December 1976, it was discovered that seven negotiable Weyerhauser Company debentures, each having a face value of $100,000, were missing from the offices of a New York City clearing house which had received them from a seller for delivery to his buyer. Both the buyer and the seller were located in New York City; both presumed that the bonds had been stolen.

On January 2 or 3, 1977, Dorward, who was in San Francisco, received a call from DiRodio, who was apparently in Las Vegas, in which DiRodio said that he had access to some bonds that could serve

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*The Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

as collateral for a loan Dorward was trying to arrange. DiRodio gave Dorward the serial number, year of maturity, and other identifying data corresponding to one of the missing debentures. In answer to Dorward's question, DiRodio assured him that there was nothing wrong with the debentures, that "they were not on any list, hot list."

A few days later, DiRodio, Guglielmini, and Herko met with Dorward at a San Francisco Holiday Inn (the Inn). Although DiRodio said that they had the debentures with them, Dorward was not shown any of the missing securities at that time. He was again assured that they were "not on any [hot] list at the present time."

Dorward, in trouble with the law on an unrelated matter, decided to act as an informer and contacted the FBI. The FBI was unable immediately to verify that the debentures described by DiRodio were stolen and asked Dorward to stall the three men. Guglielmini and Herko, who had brought the debentures with them from New York, said that they could not remain in San Francisco that day, but would return with the bonds the next Monday if plane fare were provided.

Thereafter, the FBI determined that the bond DiRodio had described was from among those missing in New York. Tickets for a flight from New York to San Francisco were purchased for Herko and Guglielmini by the FBI. DiRodio then called Dorward to inform him that another man, Sidney Fried, would also be coming from New York. It was agreed that Fried would pay his own plane fare; as it turned out, however, Fried used the ticket purchased for Guglielmini.

Dorward picked up DiRodio at the airport in San Francisco on Monday morning, January 10, 1977, and the two went to room 332 of the Inn where Herko and Fried were waiting. Dorward and Fried were introduced to each other and exchanged greetings. Then Herko, DiRodio, and Dorward proceeded to discuss the debentures, and one of them was produced for Dorward's inspection. Fried was in room 332 during this discussion but he did not participate in the conversation or, according to him, even overhear it. Dorward and DiRodio then left with the debenture.

Dorward and DiRodio bought a new envelope for the debenture, then went to an office building in San Francisco where FBI Agent Robinson was posing as an attorney who would inspect the bond. DiRodio remained outside on the sidewalk while Dorward met Robinson. Upon ascertaining that the debenture was from among those stolen in New York, Robinson sent men out to arrest DiRodio. Other agents went to the Inn and arrested Herko and Fried. Some time later Guglielmini arrived at the Inn; he voluntarily went to FBI headquarters for questioning and was arrested there. A search warrant for room 332 was subsequently obtained and executed. Hidden in a chair cushion were two more of the missing debentures.

After their arrest, the suspects, except for Herko, who apparently chose to remain silent, gave various explanations for their presence in San Francisco. Fried told FBI agents that Herko had offered him a free trip to San Francisco which he had accepted in order to visit a friend there. He said "that it's not unusual that he uses names of other people on tickets for himself because he travels quite a bit." He claimed

that he did not know DiRodio or Dorward and that he did not even hear the conversation that took place when Herko, DiRodio, and Dorward discussed the debentures.

DiRodio claimed that he had met with no one that day except Dorward and that Dorward had had the debenture all along. He said that "he didn't know what the bond was."

During questioning before his arrest, Guglielmini denied any knowledge of the missing debentures. After being arrested, he claimed acquaintance with Herko only. He said he did not know DiRodio or Dorward; the record does not disclose whether he was asked about Fried.

The arresting officers found in Herko's possession an address book bearing the names and telephone numbers of Fried, Guglielmini, DiRodio, and Dorward. Fried's name was also found on a piece of paper in Guglielmini's wallet.

Fried was tried together with DiRodio, and both were convicted. Fried now urges four grounds for a reversal of his conviction.[1] We find none of them persuasive.

II

Fried first argues that the warrant under which room 332 at the Inn was searched was illegally issued because the underlying affidavit of Agent Robinson was inadequate. In particular, Fried alleges that the affidavit failed to show that a federal offense had been commit-

[1]DiRodio also appealed his conviction which was reversed by this court, 565 F.2d 573 (9th Cir. 1977), because the post-arrest statements of Fried were found to have been erroneously entered against him.

ted, that the informer (Dorward) was reliable, or that the objects of the search might be in room 332. For these reasons, contends Fried, the district judge was in error when he denied the pretrial motion to suppress the evidence seized during the search, which included two of the missing debentures.

The principles governing the sufficiency of search warrant affidavits are by now well established. Where, as here, the affidavit is based upon the hearsay declarations of an informer, the magistrate issuing the warrant must be presented with at least some of the facts from which the informer concluded that the objects to be seized are indeed located at the place to be searched, and with some of the underlying circumstances from which the affiant has determined that the informer is credible and his information reliable. *Aguilar v. Texas,* 378 U.S. 108, 114 (1964). In the absence of a description of how the informer gathered his information, the latter requirement is satisfied if the informer has described the criminal activity in sufficient detail to assure the magistrate of his reliability. *Spinelli v. United States,* 393 U.S. 410, 416 (1969).

From the affidavit the magistrate need only conclude that criminal activity is probably shown; a prima facie demonstration is not required. *Id.* at 419; *United States v. Mulligan,* 488 F.2d 732, 736 (9th Cir. 1973), *cert. denied,* 417 U.S. 930 (1974). In reaching his conclusion, the magistrate should read "the affidavit as a whole[,] . . . giving the language a common sense and realistic interpretation. . . ." *United States v. Bowers,* 534 F.2d 186, 192 n.5 (9th Cir.), *cert. denied,* 429 U.S. 942 (1976); *accord, United States*

v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970).[2] Thus, while we insist that probable cause be shown, we give "great deference" to the decision of the magistrate who concludes that such a showing has been made. *Spinelli v. United States, supra,* 393 U.S. at 419; *United States v. Bowers, supra,* 534 F.2d at 188-89.

Measured against this standard, we have little trouble finding that the search warrant was properly issued. The affidavit of Agent Robinson[3] was based largely

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[2]As the Supreme Court put it in United States v. Ventresca, 380 U.S. 102, 108 (1965):

> [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

[3]The affidavit reads as follows:

> Being duly sworn I state that:
>
> I am a Special Agent with the Federal Bureau of Investigation located in San Francisco, California.
>
> On January 10, 1977, Special Agent FREDERICK A. GROSS advised the affiant that Special Agent LARRY KENNEDY, Federal Bureau of Investigation, New York City, New York, advised him that the Securities Section, Chemical Bank and Trust Company, New York, stated that MORGAN STANLEY, a Securities Broker, 55 Water Street, New York City, reported that Weyerhauser Sinking Fund Debenture numbers RU3535-RU3536 and RU3553-RU3557 were to have been delivered to him by December 20, 1976. As of January 10, 1977 he had not received them and considers them stolen.
>
> On January 10, 1977, GEORGE DORWORD [sic] advised the affiant that at approximately 11:00 AM on January 10, 1977, he was present in Room 332, Holiday Inn, Fisherman's Wharf, 1300 Columbus Avenue, San Francisco, where he observed a large brown manila envelope lying on a table in the room. DORWORD stated that he observed ROBERT HERKO take from this manila envelope two pieces of paper and place them in an open suitcase which was in Room 332. DORWORD stated that HERKO then gave the manila envelope to "ART" DI RODIO, who then gave it to DORWORD. DORWORD said that he immediately examined the contents of the envelope and observed Weyerhauser Sinking Fund Debenture RU3557. He subsequently supplied this security to the affiant.

upon the statements of Dorward who had seen and handled one of the missing debentures in room 332 and subsequently delivered it to Robinson. The affidavit specifically identified the bond as one of those presumed stolen in New York.

Fried argues that since the affidavit did not specifically state that the value of the missing property was over $5,000 or show that it had moved in interstate commerce, necessary elements of the section 2314 offense were not shown to exist. But the magistrate was entitled to infer that since the debentures were apparently stolen in New York and at least one of them was now in San Francisco, they were probably transported in interstate commerce by one or more of the suspects. The magistrate could also properly use common knowledge to support the conclusion in the affidavit that the securities were possessed in violation of section 2314 which requires that the property be worth more than $5,000. We agree with the district judge "that the magistrate doesn't have to close his mind to the affairs of the world to know that debenture bonds customarily are traded in amounts of $1,000 or more" and that others of the seven missing securities might well have accompanied the one obtained by Dorward.

The magistrate also had probable cause to believe that room 332 was the place where the property would be located. The fact that those possessing the debenture had displayed it in a hotel room suggested that, like other travelers, they would likely keep all their belongings in that place. *See United States v. Lucarz, supra,* 430 F.2d at 1055.

Finally, the magistrate was justified in believing Dorward to be credible. The affidavit stated that Dorward saw and handled one of the debentures, that he noted the serial number, and that the bond was personally given by Dorward to the affiant. Although the affidavit did not directly vouch for Dorward's reliability, the production by Dorward of the debenture itself weighs heavily in favor of his reliability, *United States v. Fluker,* 543 F.2d 709, 714 (9th Cir. 1976), as does the detail with which the missing property and the manner in which it was received were described. *Cf. United States v. Archuleta,* 446 F.2d 518, 520 (9th Cir. 1971) (informant's tip given in sufficient detail to provide probable cause for arrest).

We conclude that the magistrate had probable cause to issue the search warrant. The motion to suppress was therefore properly denied.

III

Fried next contends that the district judge should have granted his motion to dismiss the indictment against him. He argues that the grand jury was not presented with sufficient evidence to show that the federal offense charged had been committed at all, and that there was, in any event, no probable cause shown that Fried himself was involved in any criminal activity.

The district judge concluded that he was foreclosed by *Costello v. United States,* 350 U.S. 359 (1956), from inquiry into the sufficiency of the evidence upon which the indictment was based, but that even if he were not, he would rule that the grand jury had properly indicted Fried.

As authority for the proposition that the trial court was entitled to dismiss the indictment for insufficiency of the evidence before the grand jury, Fried cites the dicta in *United States v. Fox,* 425 F.2d 996, 1001 (9th Cir. 1970): "A decision to quash an indictment because of the admission of incompetent evidence [before the grand jury] lies in the sound discretion of the trial court." However, we believe we are bound by the statement of the Supreme Court in *Costello* that

> [i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363 (footnote omitted); *accord, Lawn v. United States,* 355 U.S. 339, 348-50 (1958). We

therefore conclude that we are compelled to affirm the district judge's holding that he was foreclosed from making an inquiry into the sufficiency of the evidence presented before the grand jury.

IV

Fried's third argument is that the post-arrest statements of Guglielmini (who was tried separately) and DiRodio were improperly admitted into evidence against him. His entire argument is premised on the notion that the testimony of the FBI agents, by which the statements were put before the jury, constituted hearsay evidence. Because DiRodio and Guglielmini had already been arrested, Fried claims any conspiracy was necessarily concluded and the "coconspirator exception"[4] to the hearsay rule was not applicable.

As authority, Fried relies upon *United States v. DiRodio,* 565 F.2d 573 (9th Cir. 1977), in which his codefendant successfully appealed his conviction to this court on the ground that Fried's post-arrest statement should not have been admitted against him (DiRodio). In *DiRodio,* however, the government relied upon Fried's statement to buttress the credibility of Dorward. Thus, the statement was offered for the truth of the matter asserted and was clearly hearsay. *Id.* at 575-76. In this case, it is clear from the record that the post-arrest statements of DiRodio and Guglielmini were offered not for their truth, but because the government believed they were obviously false. The

[4]Under Fed. R. Evid. 801(d)(2)(E) statements by a coconspirator "during the course and in furtherance of the conspiracy" are actually treated not as coming within an exception to the hearsay rule, but simply as nonhearsay. This rule, however, continues to be referred to as the "coconspirator exception."

statements were therefore not within the definition of hearsay at all.[5]

The Supreme Court recently encountered the same question in *Anderson v. United States,* 417 U.S. 211 (1974). In that case, the demonstrably false testimony of two men at an election contest hearing was introduced against themselves and others on trial for conspiracy to cast fictitious votes in the election. The Supreme Court held that even if the conspiracy had ended, the statements were admissible:

> We think it plain [that the statements] were not [hearsay]. Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. The election contest testimony . . ., however, was not admitted into evidence . . . to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.

Id. at 219-20 (footnotes omitted).

Here, as in *Anderson,* the government desired merely to have the jury compare the coconspirators' exculpatory statements with "other admissible evidence"—Dorward's testimony—to prove the inconsistency. The statements were not hearsay.

[5]Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

V

Finally, Fried raises two contentions concerning the sufficiency of the evidence against him. He first argues that the pre-arrest statements of his alleged coconspirators as testified to by Dorward were improperly admitted. He also contends that the evidence was insufficient to go to the jury.

Under Fed. R. Evid. 801(d)(2)(E), of course, statements by coconspirators made during the course and in furtherance of the conspiracy are not subject to a hearsay attack. But in order to invoke this rule, there must be, independent of the statements, (1) evidence that the conspiracy existed and (2) at least slight evidence connecting the defendant with it.[6] *United States v. Dixon,* 562 F.2d 1138, 1141 (9th Cir. 1977).[7] As the evidence is clearly adequate to

[6]As we stated in DiRodio's appeal, we appropriately discuss the coconspirator exception to the hearsay rule even though conspiracy was not explicitly charged since the government's case depended upon a showing of a common criminal plan or venture. 565 F.2d at 575 n.3.

[7]In United States v. Dunn, 564 F.2d 348 (9th Cir. 1977), we recently reviewed the quantum of evidence necessary to support a conspiracy conviction. We there held that both the existence of the conspiracy and the defendant's connection thereto must be proved beyond a reasonable doubt. *Id.* at 356-57. In the case before us, however, we are not concerned with the quantum of evidence necessary to support a conspiracy conviction, but rather the quantum necessary to admit a coconspirator's statements pursuant to Fed. R. Evid. 801(d)(2)(E).

In our view, these situations require the application of differing rules. When considering the question of sufficiency of evidence, fundamental legal principles require that each element of the offense be proven beyond a reasonable doubt. When considering admissibility, however, sound judicial policy militates in favor of placing probative and reasonably credible evidence before the trier of fact.

While some of the reasoning of United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977), has been called into question by *Dunn*, the holding itself has not been affected. Accordingly, we reaffirm our position announced in *Dixon* that admission of a coconspirator's statement under Rule 801(d)(2)(E) requires substantial evidence of the existence of the conspiracy and "slight" evidence of the defendant's connection to the conspiracy. *Id.* at 1141.

prove a conspiracy existed, the only question remaining on the admissibility issue is whether there was at least slight evidence connecting Fried to it.

The record reveals the following facts, independent of any coconspirator statements: (1) Fried and conspirator Herko accompanied the stolen debentures from New York to San Francisco; (2) Fried used a ticket purchased by the FBI for conspirator Guglielmini who, along with Herko, had previously met with Dorward about selling the debentures; (3) Fried was present in room 332 of the Inn when Dorward was shown one of the stolen debentures and was later arrested there; (4) the subsequent search of the room in which Herko and Fried were staying disclosed two more of the missing debentures; (5) Herko and Guglielmini had Fried's name and telephone number on their persons. Clearly, this is at least slight evidence to connect Fried with the conspiracy and, therefore, the pre-arrest statements were admissible.

The final issue raised by Fried was whether the evidence was sufficient to go to the jury. The test we apply is whether the evidence against Fried, as construed most favorably to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), was sufficient to allow the jury to conclude beyond a reasonable doubt that he was guilty.

In applying this test, we may consider not only the evidence identified in determining the admissibility of the pre-arrest statements, but we now may also

consider the pre-arrest statements themselves. While we agree with the district judge that the evidence was not overwhelming, we also agree with him that the evidence was sufficient to go to the jury on the issue of whether Fried aided and abetted the commission of the crime.[8]

AFFIRMED.

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[8]Although Fried was not charged as a conspirator but as a principal, analysis under the coconspirator exception to the hearsay rule was properly used to determine the admissibility of some of the evidence against Fried. United States v. DiRodio, supra, 565 F.2d at 575 n.3. We are satisfied, however, that the jury verdict against Fried as a principal was proper. As the trial judge instructed the jury, a principal is anyone who "aids, abets, counsels, commands, induces or procures [the] commission" of an offense against the United States. 18 U.S.C. § 2(a).

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Sidney Fried, Defendant-Appellant. No. 77-3403.

Before: WALLACE and ANDERSON, Circuit Judges, and EAST,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

APPENDIX C.

Grand Jury for the Northern District of California.

Reporter's Transcript of Proceedings.

Testimony of C. David Robinson.

Reported by: Joanne Goluch.

Appearances: For the United States of America, RAY BIETZ, Assistant U.S. Attorney, U.S. Department of Justice, 450 Golden Gate Avenue, San Francisco, California.

WEDNESDAY, JANUARY 26, 1977

C. DAVID ROBINSON

Called as a witness on behalf of the United States Grand Jury in and for the Northern District of California, having been by me first duly sworn, testified as follows:

EXAMINATION BY MR. BIETZ

MR. BIETZ: Q. Give us your name and occupation, please.

A. My name is C. David Robinson. I'm a Special Agent with the Federal Bureau of Investigation.

Q. You are here to testify in the case of United States versus Joseph ANTHONY DI RODIO, FRANK —how do you pronounce that?

A. Guglielmini.

Q. —Robert Herko, and Sidney Fried; is it?

A. Yes.

Q. Herko, (spelling) H-e-r-k-o, and Fried, (spelling) F-r-i-e-d.

A GRAND JUROR: How do you spell the first two?

MR. BIETZ: Di Rodio, (spelling) D-i R-o-d-i-o. Guglielmini, (spelling) G-u-g-l-i-e-l-m-i-n-i.

This is a one-count indictment charging the defendants with a violation of Title 18, United States Code, Section 2314, Interstate Transportation of Stolen Property.

The indictment reads:

The Grand Jury charges that:

On or about January 10th, 1977, in the City and County of San Francisco, State and Northern District of California, JOSEPH ANTHONY DI RODIO; FRANK GUGLIELMINI; ROBERT HERKO and SIDNEY FRIED, defendants herein, transported and caused to be transported in interstate commerce, from New York City, New York, to San Francisco, California, three Weyerhaueser Company sinking fund debentures bearing numbers RU3555, RU3556, and RU 3557, valued at approximately $104,000.00 each, knowing that said debentures had been stolen.

Are you familiar with the evidence in this case?

A. Yes.

Q. Tell us what it is, please.

A. Before I begin here, a man's name is going to be mentioned at times by the name of George Dorward, and Mr. Dorward came to us with this informatters in the Los Angeles area, both resulting in the FBI.

Mr. Dorward had been previously convicted in a local court in Los Angeles on a fraud scheme and is about to enter prison in a Los Angeles County Jail. And he figured if he could help us, perhaps

we could either get him a stay of sentence or have the charge dropped against him.

Previous to this information that he furnished to us on this case, he furnished information on two local matters in the Los Angeles area, both resulting in convictions.

With regards to our case, on the 8th of January, I contacted Mr. Dorward in a motel down on Fremont, by telephone, and we set up a meeting for the Sunday, which was the 9th, at 9 a.m.

At 9 a.m. I went down to talk with Mr. Dorward, then using the name George Fredericks, and he advised me as follows concerning this case:

He stated that on or about the 2nd of January, he was contacted by Joseph Di Rodio, also known as Art Di Rodio, and he advised him that he had a warehouse of several debentures valued at $1000 (sic) each that he wanted to get rid of.

Dorward then advised me that on the 6th of January, he met with Di Rodio, Robert Herko, and Frank Guglielmini here in San Francisco at the Fisherman's Wharf Holiday Inn where they discussed how they were going to get rid of these debentures.

A GRAND JUROR: What is a debenture?

THE WITNESS: Actually, in simple terms it's an I.O.U., a form of stock. And, well, does that satisfy it?

A GRAND JUROR: Yes.

THE WITNESS: At this meeting on the 6th, Guglielmini told Dorward that the bonds were not hot.

He said that they were properly endorsed, and they weren't on any list. This is important because then

Dorward could go into negotiations in this particular case with a lawyer in order to try and use them in an escrow account.

Dorward advised me he did not see the bonds at this time, but Guglielmini had in his possession an envelope, 8½ by 11, that was sealed. And, in this envelope was supposedly this particular bond.

On the 2nd, when Di Rodio initially called Dorward, concerning the bonds, he described one of these bonds accurately, and told him that it was a sinking fund debenture, Weyerhaueser, the issue date, the amount, when it was due, this sort of thing.

At that meeting, they discussed how to get rid of the bonds. Herko and Guglielmini wanted one bond to be disposed on on the 7th, and Dorward went out to arrange a meeting with a local lawyer to place it in an escrow account and draw money against it. Dorward could not do this. Accompanied by Di Rodio, he could not make a deal that fast. He convinced Herko and Guglielmini he could do it the following Tuesday, the 10th.

That evening he put Di Rodio on a plane to Las Vegas, and assumes Herko and Guglielmini went back to Newark where they come from originally.

On that evening, the 7th, he contacted an agent with the FBI in Los Angeles that he worked with before on another matter and that agent contacted me.

I met with Dorward on the 9th, and we had an initial problem. One, Guglielmini and Herko wanted to come back to San Francisco to get rid of at least one of the bonds, but they were demanding front money for tickets to get them back here.

Dorward did not have the money. So, as it ended up, the FBI purchased a couple of tickets for these people.

The second thing, Dorward said in order for the deal to go down, we had to have a bona fide lawyer in a law office for he and Di Rodio to visit.

The following morning on the 10th, we did have an office arranged. Guglielmini, and an individual by the name of Sidney Fried came into San Francisco, and the meeting was set up between Dorward, Di Rodio and myself in an undercover capacity as a lawyer for 1:00 o'clock that day.

At approximately 12:45 p.m. on the 10th, George Dorward arrived at a law office here in town where he presented me with a Weyerhauesar sinking fund debenture, RU3557.

At that time, Di Rodio did not accompany him into the office as was originally planned, but remained out on the street. Dorward showed us, pointed out an individual walking up and down the street, and said, "That's Di Rodio."

And at that time, we arrested him. The arrest was based on previous authorization of the United States Attorney.

We arrested Robert Herko and Sidney Fried in their hotel room at the Holiday Inn. At the time of the arrest, they did not give us a consent to search the room. A few hours later, we got a search warrant and searched the room and found two other bonds in the room secreted in the back of a chair.

Frank Guglielmini was not on the premises of the Holiday Inn when the arrests were made. He did show up a little bit later.

One of our agents recognized him, engaged in conversation and explained the situation and asked him to come down to our office. When he did, he was placed under arrest.

We interviewed the four individuals. Mr. Rodio advised us that he knew nothing about the transportation of any bonds. He advised us, he come into town to talk to George Dorward on a business deal.

Sidney Fried advised us that he just accompanied Herko because he was asked to. He did state, while in the room of the Holiday Inn on the 10th, two individuals, one, George and Art did come into the room and conducted some business with Herko. Herko declined to say anything at all.

While this investigation was going on, we confirmed in New York City that these seven bonds that they had mentioned before had been purchased by a brokerage house in New York and were supposed to accept delivery of these bonds the 20th of December. As of the 10th of January, they had not been delivered. They were paid for and considered by the brokerage house to be stolen.

Since the arrest, we sent certain—we sent the bonds and other evidence to our laboratory for latent fingerprint examination and they have informed us that Robert Herko's fingerprints show up on a brown manila envelope and one of the Wyerhauesar sinking fund debentures, and Frank Guglielmini's fingerprints show up on a brown manila envelope which was used to transport the bonds.

That's basically it.

MR. BIETZ: Questions?

No questions.

Thank you for a very good presentation.

THE WITNESS: Thank you.

CERTIFICATE OF REPORTER

I, *JOANNE GOLUCH*, duly authorized shorthand reporter, United States District Court for the Northern District of California, do hereby certify:

That the foregoing transcript, pages 1 through 8, inclusive, constitutes a true, full and correct transcript of my shorthand notes taken as such reporter of the proceedings herein and reduced to typewriting under my supervision and control to the best of my ability.

/s/ Joanne Goluch

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1978.

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